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In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, APPELLANT

v.

UNITED SHOE MACHINERY CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion and order of the district court denying the government's petition for modification (A. 73–83) is reported at 266 F. Supp. 328. The original opinion and decree of the district court is reported at 110 F. Supp. 295, and the *per curiam* opinion of this Court affirming that decree is reported at 347 U.S. 521.

JURISDICTION

The order of the district court was entered on April 11, 1967. The United States filed a notice of appeal on June 9, 1967. By order dated August 7, 1967, the lower court extended the time for docketing the ap-

peal to September 8, 1967, and the jurisdictional statement was filed on that date. Probable jurisdiction was noted on December 4, 1967. The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *Brown Shoe Co.* v. *United States,* 370 U.S. 294; *United States* v. *E. I. du Pont de Nemours & Co.,* 366 U.S. 316.

QUESTION PRESENTED

Whether the district court's denial of a government petition for modification of a litigated antitrust decree, on the grounds that the decree was working as originally contemplated and that no grievous wrong evoked by new unforeseen circumstances had been clearly shown, was erroneously based upon an improper standard for determining when the government is entitled to further relief in Sherman Act cases, particularly since the original decree specifically contemplated future judicial consideration of its effectiveness.

STATUTE INVOLVED

Sections 2 and 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1 *et seq.,* provide in pertinent part:

> Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign na-

tions, shall be deemed guilty of a misdemeanor * * *.

* * * * *

Section 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1–7 of this title * * *.

STATEMENT

I. THE UNDERLYING FACTS

This is a direct appeal from an order of the district court denying the government's petition to modify the antitrust decree entered in 1953 which resulted from a civil action brought against the United Shoe Machinery Corp. ("United") for monopolization of the domestic shoe machinery industry.

A. THE 1953 PROCEEDINGS

In 1953 the district court held that United had monopolized the manufacture of shoe machinery in violation of Section 2 of the Sherman Act, 15 U.S.C. 2 (110 F. Supp. at 343). It found that United "is supplying over 75%, and probably 85%, of the current demand in the American shoe machinery market" (*id.* at 339); that this constituted monopoly power; and, not being "economically inevitable," that possession of such power violated Section 2 (*id.* at 345). More specifically, the district court concluded that "the facts show that (1) defendant has, and exercises, such overwhelming strength in the shoe machinery market that it controls that market,. (2)

this strength excludes some potential, and limits some actual, competition, and (3) this strength is not attributable solely to defendant's ability, economies of scale, research, natural advantages, and adaptation to inevitable economic laws" (*id.* at 343).[1] The primary barriers to competition were found to be United's size, know-how, patents, servicing network, and the leasing system whereby United refused to sell many of its machines and required long-term leases which obligated the lessee to utilize United's machinery regularly and over a long period of time.[2]

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[1] The district court further noted (*id.* at 344): "To combat United's market control, a competitor must be prepared with knowledge of shoemaking, engineering skill, capacity to invent around patents, and financial resources sufficient to bear the expense of long developmental and experimental processes. The competitor must be prepared for consumers' resistance founded on their long-term, satisfactory relations with United, and on the cost to them of surrendering United's leases. Also, the competitor must be prepared to give, or point to the source of, repair and other services, and to the source of supplies for machine parts, expendable parts, and the like. Indeed, perhaps a competitor who aims at any large scale success must also be prepared to lease his machines. These considerations would all affect *potential* competition, and have not been without their effect on *actual* competition."

[2] In discussing the existing barriers to effective competition, the district court stated (*id.* at 343–344): "In estimating defendant's strength, this Court gives some weight to the 75 plus percentage of the shoe machinery market which United serves. But the Court considers other factors as well. In the relatively static shoe machinery market where there are no sudden changes in the style of machines or in the volume of demand, United has a network of long-term, complicated leases with over 90% of the shoe factories. These leases assure closer and more frequent contacts between United and its customers than would exist if United were a seller and its customers were buyers.

The district court stated the precepts underlying its decree as follows (*id.* at 346–347):

> Where a defendant has monopolized commerce in violation of § 2, the principal objects of the decrees are to extirpate practices that have caused or may hereafter cause monopolization, and to restore workable competition in the market.

The court declined at that time to order the relief requested by the government—that United be divided into three equal-sized shoe machinery manufacturing

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Beyond this general quality, these leases are so drawn and so applied as to strengthen United's power to exclude competitors. Moreover, United offers a long line of machine types, while no competitor offers more than a short line. Since in some parts of its line United faces no important competition, United has the power to discriminate, by wide differentials and over long periods of time, in the rate of return it procures from different machine types. Furthermore, being by far the largest company in the field, with by far the largest resources in dollars, in patents, in facilities, and in knowledge, United has a marked capacity to attract offers of inventions, inventors' services, and shoe machinery businesses. And, finally, there is no substantial substitute competition from a vigorous secondhand market in shoe machinery.

* * * * *

"But United's control does not rest solely on its original constitution, its ability, its research, or its economies of scale. There are other barriers to competition, and these barriers were erected by United's own business policies. Much of United's market power is traceable to the magnetic ties inherent in its system of leasing, and not selling, its more important machines. The lease-only system of distributing complicated machines has many 'partnership' aspects, and it has exclusionary features such as the 10-year term, the full capacity clause, the return charges, and the failure to segregate service charges from machine charges. Moreover, the leasing system has aided United in maintaining a pricing system which discriminates between machine types."

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firms—and instead imposed a variety of conditions and restrictions upon United's activities designed "to recreate a competitive market" (110 F. Supp. at 347). These included requirements that United cease monopolizing the market; that United offer for sale, at comparable terms, all machines which it leases; that United lease machines for periods no greater than five years; that United not refuse to lease or sell machines to all prospective customers (except for good cause); that United dispose of its facilities for the manufacture or distribution of tacks, nails and eyelets; that United issue reasonable royalty licenses to any applicant on all patents then held by it; and that United not acquire any substantial shoe machinery manufacturer or manufacturer or distributor of supplies for shoe factories (see A. 2, 4, 5, 6).

Paragraph 18 of the decree provided that, ten years after its entry,

> * * * both parties shall report to this Court the effect of this decree, and may then petition for its modification, in view of its effect in establishing workable competition. If either party takes advantage of this paragraph by filing a petition, each such petition shall be accompanied by affidavits setting forth the then structure of the shoe machinery market and defendant's power within that market. [110 F. Supp. at 354; A. 7.]

United appealed to this Court, attacking both the findings and the decree. No appeal was taken by the government. After oral argument, this Court affirmed in a *per curiam* opinion stating that the district

court's "findings are justified by the evidence and support the decree * * *" (347 U.S. 521).

B. THE 1965 PETITIONS

Acting pursuant to Paragraph 18, the United States reported to the district court, on January 1, 1965, that United retained a dominant share of the market and that workable competition had not been established in the shoe machinery industry, and accordingly petitioned for additional relief. United cross-petitioned to be relieved from certain restrictions of the decree.

In its petition for modification the government requested the district court to find that the decree "has not been effective in establishing workable competition in the shoe machinery market" and that United "still has and exercises monopoly power" in that market; to require United to submit a plan under which it would "establish an independent, full-line shoe machinery manufacturing company capable of competing with the defendant in the shoe machinery market"; to hold hearings to assure that such plan "is feasible and equitable, does not result in a forfeiture to defendant's stockholders, and promises a fair chance of said new company being able to survive and compete with defendant"; and to grant "such other and further relief as may be necessary to establish workable competition" in the market (A. 10).

United, on the other hand, asked for a "determination that workable competition in shoe machinery has now been established, for the vacating and setting aside of said decree accordingly, and for the entry of

an amended decree in the form annexed hereto" (A. 12). The amended decree proposed by United would have retained only the provisions requiring United to sell (on comparable terms) as well as lease its machines, to charge separately for installation and servicing of machines, and to avoid in its leases a full-capacity clause or other provision proscribed by the original decree (A. 13–14).

After a hearing, the district court, on April 11, 1967, denied both petitions (A. 84).[3]

C. UNITED SHOE MACHINERY CORP.

United is the largest manufacturer of shoe machinery in the world, and has been the dominant factor in the American shoe machinery market since 1899, when its corporate predecessor was created as an agglomeration of most of the significant American manufacturers of shoe machinery (110 F. Supp. at 299–300). Its market dominance was created and preserved by a series of acquisitions and mergers (*id.* at 312).[4] In 1950 it was primarily a manufacturer of shoe machinery and shoe supplies, with assets of about $105 million; its 1946–1950 earnings after taxes ranged between $6.2 million and $8.8 million (*id.* at 300).

By 1964 United had become a diversified company operating domestically and internationally through some 66 subsidiaries and affiliates which serve general

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[3] United has not appealed from the denial of its petition.

[4] See also *United States* v. *United Shoe Machinery Co. of New Jersey*, 247 U.S. 32; *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451.

industrial and consumer markets, as well as the footwear industry, in the United States and overseas. 1965 Moody's *Industrial Manual* 1200–1203. As of 1964, its assets totalled $232.5 million (*id.* at 1202), and its gross operating income from all sources was $208.7 million (*id.* at 1201). In addition to shoe machinery it also produces chemicals, industrial adhesives, sealants and coatings, fasteners, shoe boxes, box-making machines, brushes, and customer-specified metals and plastic products.

D. THE STRUCTURE OF THE SHOE MACHINERY INDUSTRY AFTER THE DECREE

The relevant product market, as defined in the district court's original opinion (110 F. Supp. at 302–303), included all shoe machines except dry-thread sewing and other machines not then offered by United. In the instant proceeding relating to modification, the market was broadened to include vulcanizing machines, which the court found to compete with newly developed injection-molding machines and other machines as a method of attaching soles (A. 76). The relevant geographic market has throughout been the entire United States.

As of 1953, United's share of the shoe machinery market by any measure was about 85 percent (A.76; cf. 110 F. Supp. at 339, placing United's share at "over 75% and probably 85%"). The decree began operating in 1955 (A. 1). The government's evidence showed that, as of 1963, there were approximately 100

firms in the shoe machinery industry, including 66 manufacturers (Pl. Exh. 69; A. 24–25),[5] 12 importers (Pl. Exh. 71; A. 27), and 22 second-hand dealers (Pl. Exh. 72; A. 28). Total industry revenues derived from the lease and sale of shoe machinery were $41.5 million (Pl. Exh. 73; A. 29). United's share was $25.8 million, consisting of $3.4 million in sales and $22.3 million in lease revenues, or 62.2 percent (Pl. Exh. 69, *supra*). United's largest competitor, International Shoe Machine Corp., had total revenues of $3.9 million; the next largest, Compo Shoe Machinery Corp., had revenues of about $3 million (Pl. Exh. 69, *supra*). United employed 21,285 persons, 6,375 of them in the United States. Compo employed 394 persons, while International employed 239 (Pl. Exh. 1; A. 15). No other shoe machinery manufacturer had sales in excess of $1 million, and only 16 had revenues in excess of $100,000 (Pl. Exh. 69, *supra*). The remaining 49 manufacturers were quite small; only two had more than 100 employees.

Of the 12 importers, whose combined revenues in

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[5] "Pl. Exh." refers to exhibits introduced by the government in the proceedings below. "A." refers to the printed joint appendix in this Court, in which certain of the government's exhibits are reproduced. "Tr." refers to the transcript of proceedings in the district court, begun on October 17, 1966, a copy of which is on file with the Clerk. Transcript references herein included are, for the most part, to where a particular exhibit not contained in the joint appendix was admitted into evidence.

1963 were only slightly over $1 million, only four had revenues in excess of $100,000 (Pl. Exh. 71, *supra*). The largest importer had 30 employees and none of the others had more than ten. The 22 second-hand dealers' total revenues were $3.4 million, but only one, Plymouth Machinery Company, had revenues in excess of $1 million, and only five others in excess of $100,000 (Pl. Exh. 72, *supra*). Plymouth had 25 employees, and the other dealers were considerably smaller. There was evidence that, because of the shoemakers' preference for leasing (A. 77–78), the supply of used machines to the second-hand market has been dwindling (Pl. Exh. 68, A. 23; Pl. Exh. 74, Tr. 557; see Tr. 258).

In its original opinion, the district court had determined United's market position from a survey of percentage shares of outstanding machines (110 F. Supp. at 303–307). In 1963, United accounted for approximately 84 percent of the 18 major machines listed in the original decree (Pl. Exh. 53, A. 22).[6] It shipped 65 percent of all major machines to shoe factories (Pl. Exh. 64, Tr. 388), and seven times as many machines of all types as its next largest competitor (Pl. Exh. 63, Tr. 388). It offered 115 types of machines while its largest competitor offered only 22, and most offered far fewer (A. 78–79).

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[6] United, according to its own sample, accounts for 100 percent of the injection-molding machines used in this country (Def. Exh. 60A, Tr. 1741). Injection molding is a new process of great commercial significance which substantially developed after the entry of the original decree (Tr. 89–90, 93; Pl. Exh. 29, Tr. 105).

In the district court's words, United is "without significant competition" in "certain sectors of the shoe machinery market" (~~J.S. App.~~ A. ~~35~~). There has been no development of any significant, full-line competitor (A. 80, 81), and United is presently the only company in the market manufacturing and offering a broad line of shoe machines (A. 78, 79). No independent shoe-machinery repair company has come into being since 1955 (Tr. 577).[7]

II. PROCEEDINGS IN THE COURT BELOW

A. THE PRE-TRIAL ORDER

After the filing of the cross-petitions for modification, the district court entered a pre-trial order specifying that the issues in the proceeding would, at least initially, be confined to certain matters as to which

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[7] United asserted in the court below that a sampling of the number of machines in manufacturers' inventories showed its market position to be between 52 and 57 percent and that there were no artificial barriers to entry into the industry. It also attempted to show, by a comparison of the revenue positions of 12 selected companies, that competition had been intensified because its total shoe machinery revenues had declined from $32.3 million in 1955 to $24 million in 1963, while its competitors' revenues had increased from $3.5 million in 1955 to $8.8 million in 1963.

The district court accepted these revenue figures, although they excluded United's income from conversion sales, which increased significantly in first year of the decree's operation (A. 71). Inclusion of revenues from parts and service, moreover, would have given United approximately the same aggregate shoe machinery earnings in both 1954 and 1963 (Pl. Exh. 68, *supra*; see note 11, *infra*). In addition, the court's finding that United's "12 most important domestic competitors" doubled their gross revenues between 1955 and 1963 (A. 77) is based

the court considered it appropriate to bring up to date the factual information previously available.[8] No other evidence was to be presented except as the court might specifically order. It expressly declined to consider any question of additional relief, stating that "[i]t is * * * inappropriate as of this time to offer any suggested program of divestiture, which if considered later in the hearings certainly will require a conclusive showing of the failure of the decree, as now

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upon a chart at page 15 of United's closing brief, which did not specify the 12 largest shoe machinery manufacturers in 1955 and which showed on its face that in 1955 several of the 12 companies either were not in the shoe machinery business or had revenues of unknown amounts.

[8] This pre-trial order is reproduced in the Appendix to this brief (pp. 53–55). In substance, in specifying and limiting the matters which the court regarded as appropriate for its consideration, the pre-trial order directed the parties to provide it with information which would include a census of machines, broken down in United and non-United machine types in the continental United States as of January 1, 1955, and January 1, 1965; general trends explaining any changes shown in the 10-year period; a comparison of the second-hand market at the beginning and end of the 10-year period; a description of changes in domestic shoe machinery demand and in the number and types of United and non-United equipment available; domestic shipments during 1964 for sale and lease by United, its domestic competitors and its foreign competitors, broken down by machine types; a general statement of net worth as of January 1965, annual net income as of 1963 or 1964, number of employees as of 1965, and machine types offered as of 1965, as to United and its domestic and its foreign competitors; a description of the effect of the decree on installation, construction, repair and other services; and a general description of significant developments during the last decade relating to shoe machinery patents, licensing, and challenges to patent validity or enforcement against infringers.

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operative, to have affected the goals originally contemplated" (App., *infra*, p. 55).[9] Discovery and the evidence at the hearing were limited to the matters specified in the pre-trial order.[10] Thus, the district court restricted its initial inquiry to whether any modification of the decree was required.

B. THE DISTRICT COURT'S DECISION

After an extensive hearing, the district court entered an order denying both petitions for modification (A. 84). Citing *United States* v. *Swift & Co.*, 286 U.S. 106, it stated that its original decree could not be changed unless the government made (1) a clear showing of (2) grievous wrong (3) evoked by new and unforeseen conditions (A. 74). It found that Paragraph 18 of the decree contemplated nothing more than the application of this standard, and conferred no "broader power" on the court "to alter its decree (A. 74). The statement in Paragraph 18 that the decree should be evaluated in light of its "effect in establishing workable competition," the court said, "was unfortunate because it has no precise legal meaning" (*ibid.*). When read, however, in light of the original opinion, the court stated, "the object of the decree was, during a ten year pe-

[9] With respect to the relief issue, the district court expressly stated (App., *infra*, p. 55): "Nor has the Court presently any different view from the one earlier expressed as to the desirability, or lack of desirability, of radical schemes of divestiture of United so as to atomize the enterprise."

[10] However, the court permitted the government to introduce certain revenue figures as relevant to market shares (Pl. Exhs. 69, 71, 72, 73; A. 24–25, 27, 28, 29; see *supra*, pp. 9–11).

riod, *not to restore* so-called workable competition *but to move toward* establishing it" (A. 74) (emphasis added). Thus, "what the Court was inviting [in paragraph 18] was information as to how successful the decree had been in *gradually eroding* United's 1953 power to monopolize the market" (A. 74) (emphasis added). When it entered the decree, the court said, it "was quite cognizant of the fact that permitting United to continue as a single enterprise engaged predominantly in leasing rather than selling made it almost certain that at the end of a decade, absent a strong outside challenger, United's market power would be merely diminished not destroyed" (A. 75).

The district court made 16 findings of fact from which it concluded that its decree was working as it had contemplated. It found that United now received 62 percent of total shoe machinery revenues as against 85 percent prior to the decree (A. 76),[11] and that United's overall market position ranged between three-fifths and two-thirds, roughly 25 percent less than the share it had had in 1953 (A. 77). It viewed this decrease as satisfactory in the light of findings as to the growth of United's competitors, total ship-

[11] In finding that United's shoe machinery revenues had declined from $32 million in 1955 to $24 million in 1963, the court excluded from its computation United's income from conversion sales which ballooned in 1955, the first year of the decree's operation (A. 77). If it had compared revenues in 1954 (the year before the decree) and 1963, and had included revenues from parts and service, United's aggregate shoe machinery earnings would have been $35.6 million in 1954 and $35.4 million in 1963 (Pl. Exh. 68, *supra*).

ments, machines on lease, the condition of the second-hand market, and the entry of the new narrow-line companies. It found that United had no exclusionary power over minor machines (A. 80), and that if the shoe machinery industry were divided into seven sub-markets corresponding to the seven stages of shoemaking, it was not clear that United had a dominant position in the industry (A. 80, 81). Even if it did, the court found, this was not due to restraints of trade but to United's large volume, wide contacts, superior products, skill in merchandising, efficiency, inventions, and know-how (A. 81).

Additionally, on the basis of comparisons of sales and leasing revenues between 1953 and 1963, and numbers of machines sold and leased, and the fact that its competitors were growing, the court found that United's position in the market was declining (A. 81). All "artificial" barriers to entry had been terminated, it declared, and if competition was not flourishing in some sectors it is because no competitior with large financial resources had entered the market (A. 81). This was so, the court found, because the rate of return on shoe machinery is unattractive as compared with other machinery markets (*ibid.*).

Thus, the district court determined that the decree "has operated in the manner and with the effect intended" (A. 81), and is "still working at its long-range task of freeing the market" from United's monopolization and keeping the door open for "an

adequately provided challenger" (A. 83). Accordingly, it rejected United's petition as well as the government's, stating that "[u]ntil there are competitors throughout the market, the decree should stand unmodified" (*ibid.*). Since the court had initially decided to allow evidence relating to what sort of further relief would be appropriate only if it determined that some modification of the decree was necessary (*supra,* p. 14), no evidence in this regard was introduced.

SUMMARY OF ARGUMENT

I

Decisions of this Court have clearly delineated the principles underlying relief in a monopolization case. The decree should dissipate the monopoly power and establish effective competition in the particular market. Since the adjudication of an antitrust violation without effective redress is virtually meaningless, the achieving of these objectives is of great importance. All of this was plainly recognized by the district court in 1953 when it entered its original decree after concluding that United had monopolized the domestic shoe machinery market in violation of Section 2 of the Sherman Act.

A decree seeking to create competition in a monopolized market is necessarily based upon predictions of its likely effect in the future. Such predictions cannot consistently be made with assurance of their accuracy; thus an antitrust decree, particularly in a monopolization case, must be regarded as provisional in nature

and subject to modification upon a showing that it has failed to achieve its objectives after a reasonable period of time. Indeed, the need for such flexibility was recognized in the 1953 decree in which the district court not only retained jurdisdiction generally but specifically provided in paragraph 18 for reexamination of the decree's effectiveness after ten years.

II

Measured by established standards, the record in this case and the findings of the district court reveal that the decree has not worked adequately. United's monopoly power has not been dissipated and effective competition has not been established in the shoe machinery market. This is borne out by the fact that in major sectors of the shoe machinery market United faces no significant competition. Moreover, many of the barriers to new entry which were found in 1953 still exist, and are likely to continue in the future. Accordingly, modification of the decree is required.

III

Rather than applying the standards long recognized to measure the effectiveness of a monopolization decree, the district court erroneously held that it would modify the decree only upon (1) a clear showing of (2) grievous wrong (3) evoked by new and unforeseen conditions, relying on *United States* v. *Swift & Co.*, 286 U.S. 106. Not only is the *Swift* standard inapplicable here; its rationale actually supports modification of the decree in this case. *Swift* involved an at-

tempt by antitrust defendants to escape from the restrictive provisions of a consent decree designed to prevent further monopolization. Here the government, representing the public interest, is seeking to have a litigated decree strengthened, not weakened, to assure vindication of the policies underlying the antitrust laws. Application of the *Swift* standard to such radically different circumstances misconstrues the meaning of that decision and ignores the public interest considerations which argued for a restrictive approach to modification there but support an expansive approach here.

Moreover, the district court erroneously supported its application of the *Swift* standard here by asserting that paragraph 18 of the decree conferred no broader authority upon it to modify than this Court found to exist in *Swift*. Despite the plain language of the 1953 opinion and decree to the contrary, the court maintained that all it intended was for the decree to be in the process of gradually eroding United's monopoly power during the 10 years prior to reconsideration. In effect, the Court's interpretation of paragraph 18 reads that provision out of the decree and adopts an improper standard for assessing the adequacy of decrees in monopolization cases.

IV

Since the district court applied an improper standard in determining that no further relief was necessary, remand of the case with directions to grant further appropriate relief should be ordered. No evi-

dence of various forms of additional relief was permitted under the court's narrow pre-trial order, and thus an evidentiary hearing on this question will initially be necessary. Since lesser remedies have proven inadequate, some form of relief affecting the structure of the market, which would involve divestiture of a portion of United's shoe machinery assets, seems presumptively required. There are various ways in which this might be done. If there are practical reasons why such relief would be inappropriate, the burden should be upon United to show this. Structural relief may be accompanied by certain other remedies. At all events, until a hearing is conducted on the question of additional relief, the prospects for more effective remedial action cannot be adequately evaluated.

ARGUMENT

I. IN ORDER TO RID A MARKET OF THE ADVERSE EFFECTS OF MONOPOLIZATION IT IS NECESSARY TO ERADICATE THE EXISTING MONOPOLY POWER AND TO ESTABLISH EFFECTIVE COMPETITION; A DECREE WHICH HAS FAILED TO ACHIEVE THESE OBJECTIVES AFTER A REASONABLE PERIOD OF TIME SHOULD BE APPROPRIATELY MODIFIED

In 1953 the district court held that United had monopolized the manufacture and distribution of shoe machinery in violation of Section 2 of the Sherman Act. That ruling, after plenary consideration, was affirmed by this Court. Two key facts found by the district court to support this conclusion were that United had a monopoly share of the market and had achieved and retained that position through behavior which, while not in and of itself illegal, was designed to exclude and discourage competition (110 F. Supp. at 343–344;

see note 2, *supra*). In reaching that result, the district court applied the established legal principles for determining whether monopoly power has been unlawfully acquired or maintained, and indicated an informed appreciation of the inherent dangers of monopolization.[12] Moreover, the court in 1953 showed a distinct awareness of the need to rid the market of both such power and the competitive barriers which it had created, stating (*id.* at 347):

> Dispersal of private economic power is thus one of the ways to preserve the system of private enterprise. Moreover, well as a monopoly may have behaved in the moral sense, its economic performance is inevitably suspect. The very absence of strong competitors implies that there cannot be an objective measuring rod of the monopolist's excellence * * *.

Initially, then, we turn to a consideration of the purposes and objectives of a remedial decree in a monopolization case.

Unless an effective remedy is provided, the mere adjudication of monopolization is virtually meaningless. Indeed, this Court has often pointed out that securing effective relief is the most important aspect of an antitrust case (*e.g., United States* v.

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[12] Language in the court's opinion is quite explicit in this regard, pointing out (*id.* at 347):

"* * * Concentrations of power, no matter how beneficently they appear to have acted, nor what advantages they seem to possess, are inherently dangerous * * *. Industrial advance may indeed be in inverse proportion to economic power; for creativity in business as in other areas, is best nourished by multiple centers of activity, each following its unique pattern and developing its own esprit de corps to respond to the challenge of competition. The dominance of any one enterprise inevitably unduly accentuates that enterprise's experience * * *."

United States Gypsum Co., 340 U.S. 76, 88–90), and has noted that the "remedial phase, more often than not, is crucial [because] the suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it" (*United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 323). A district court therefore is charged with effectively terminating antitrust violations once it has determined their existence. As this Court stated, "courts are authorized, indeed required, to decree effective relief to redress the violations, whatever the adverse effect of such a decree on private interests" (*du Pont, supra*, 366 U.S. at 326).

Because of the critical importance of insuring that antitrust violations are adequately redressed, this Court has traditionally exercised broad reviewing authority over lower court decrees in antitrust cases. Thus, while the district court has "the responsibility *initially* to fashion the remedy" (*du Pont, supra*, 366 U.S. at 323), the decree formulated by the district court is not simply "subject only to reversal for gross abuse" (*Gypsum, supra*, 340 U.S. at 89), but is given "the most careful scrutiny [by] this Court" (*International Boxing Club* v. *United States*, 358 U.S. 242, 253; see also *United States* v. *Loew's Inc.*, 317 U.S. 38). When a petition to modify a decree, on the ground that it has failed to cure the underlying antitrust violation, is denied, there is similarly a compelling reason for close scrutiny and careful review by this Court. The crucial consideration at both stages—initial decree and petition for modification—is the

same—to assure that the violation found will be effectively remedied.

Because excessive market power lies at the heart of monopolization, eradication of that power is the primary objective of relief in a Section 2 case. This was recognized by the district court in its 1953 opinion, where it stated (110 F. Supp. at 346–347):

> Where a defendant has monopolized commerce in violation of § 2, the principal objects of the decree are to extirpate practices that have caused or may hereafter cause monopolization, and to restore workable competition in the market.

This approach is in line with the principles relating to relief in Section 2 cases which have often been enunciated by this Court. For example, in *United States* v. *Grinnell Corp.*, 384 U.S. 563, 577, it was stated:

> [A]dequate relief in a monopolization case should put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act. * * *

In other words, the decree should seek to "pry open to competition a market that has been closed by defendants' illegal restraints" (*International Salt Co.* v. *United States,* 332 U.S. 392, 401).

Thus, the stated purpose of the district court's decree in the instant case was to create workable competition and to put an end to United's monopoly

power. Monopoly power is obviously inconsistent with workable competition. The latter term, when used in the context of relief in a monopolization case, can only be read to describe a market where no competitor has a monopoly share[18] or the attributes of monopoly power, such as the ability to fix prices, control supply, exclude competitors, and inhibit innovation. Cf. *Grinnell, supra; Alcoa, supra.*

A decree in a monopolization case, in seeking to "break up or render impotent the monopoly power found to be in violation of the Act" (*Grinnell, supra,* 384 U.S. at 577) and deprive the violator of the benefits of its illegal conduct (*Schine Chain Theatres* v. *United States,* 334 U.S. 110, 128–129), is necessarily based upon a prediction of future conditions and circumstances, and the effect of the decree upon them. Thus, there can be no certainty that a decree will in fact prove to be wholly effective. This is especially so where, as in the instant case, the court eschews structural remedies, such as divestiture, which are quite likely to produce enhanced competition, and instead tries milder injunctive measures.

Indeed, the government originally requested dissolution of United into three equal-sized competitors, but the district court rejected that suggestion. Nevertheless, the government did not appeal from the district court's denial of such relief, but instead urged this Court to affirm the decree. In so doing, we

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[18] A monopoly share of a market is indicative of monopoly power prohibited by Section 2. See *United States* v. *Aluminum Company of America* ("*Alcoa*"), 148 F. 2d 416, 429 (C.A. 2); *Grinnell, supra,* 384 U.S. at 592–593.

pointed out that the district court had "proceeded on the premise that relatively mild remedies should be tried as a first resort, and that the possibility of more drastic measures should be held in abeyance" (see Brief of the United States, No. 394, 1953 Term, pp. 154–155). The district court also recognized the transitory nature of its decree. In rejecting a prohibition of all leasing of machines by United, it stated that such a restriction "would be undesirable, *at least until milder remedies have been tried*" (110 F. Supp. at 349; emphasis added).

In short, it could not be known with certainty whether the 1953 decree's provisions would prove to be sufficient. There was thus a compelling need for the district court to retain the broad power to modify that decree in order to ensure adequate redress of the violation. This need was clearly recognized in the 1953 decree; paragraph 18 (supra, p. 6) provided for a specific reexamination of the decree's effectiveness after a fixed period of time. The importance of preserving such flexibility has long been recognized in antitrust jurisprudence. In *United States* v. *Swift & Co.*, 286 U.S. 106, 114, this Court pointed out:

> A continuing decree of injunction directed to events to come is subject always to adaption as events may shape the need. * * * The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative.

II. THE DECREE HAS FAILED TO ACCOMPLISH WITHIN A REASONABLE TIME ITS GOALS OF DISSIPATING UNITED'S MONOPOLY AND CREATING WORKABLE COMPETITION IN THE SHOE MACHINERY MARKET

It is clear upon the instant record, and under the district court's findings, that United continues to enjoy a monopoly or near-monopoly position in the shoe machinery market more than 10 years after entry of the original decree. Thus, the decree has failed to break up or render impotent United's monopoly power and establish workable competition in the relevant market. Under the proper standard for assessing the effectiveness of relief in monopolization cases, as developed in the cases discussed *supra*, pp. 21–25, the decree has not accomplished its intended objectives within a reasonable period of time.

In our view, the district court's most significant finding is that United presently controls between three-fifths and two-thirds of the shoe machinery market and receives 62 percent of total industry revenues (A. 76, 77). Such a dominant market share clearly indicates the retention of substantial market power, and is an unsatisfactory result 10 years after an adjudication of monopolization. Whether United could presently be found to possess monopoly power or not in a new proceeding is inconsequential. Here the original proceeding resulted in a determination that United had monopoly power in violation of the Sherman Act. A decree that has only reduced that power to a limited extent after a lengthy test period has proved to be inade-

quate. At the least, exploration of possible forms of additional relief is required.

Comparing United to the other companies in the shoe machinery industry reveals the scope of United's continued dominance. Only two of those competitors, International and Compo, have revenues in excess of $1 million, and their combined market shares in 1963 were considerably less than one-third of United's then-existing share of the market. The remaining companies in the industry were all extremely small (only 16 had revenues in excess of $100,000), and only marginal competition was offered by the 12 importers, of whom only one had revenues in excess of $1 million and only five in excess of $100,000. Second-hand dealers offer competition to United in a limited way, but innovation could render their inventory almost worthless and, in any event, they rely upon a supply of used machinery which has initially been sold by shoe manufacturers. Moreover, the supply of United machines available for the second-hand market has been continually declining since 1955 (see Pl. Exh. 68, *supra*), and cannot be rapidly altered to meet increased demands. Thus, the second-hand market, which at most comprises a marginal competitive threat, is likely to become increasingly less significant in the future.

The district court also found that none of United's competitors offered a broad line of shoe machinery. Even the two largest, Compo and International, offer only 22 and five types of shoe machines, respectively, and, as the court pointed out, "most companies [offer]

only 1" (A. 78, 79). When compared with the 115 types of machines offered by United on current terms and 24 types on application, as found by the district court, and the fact that of the 187 operations in domestic shoe factories, United was the sole source of supply for 45 (A. 80), the continuance of United's market dominance is evident.

The competitive situation in the shoe machinery industry is in many ways similar to the liquid bleach industry involved in *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 571. In that case, which involved the legality of the acquisition of Clorox by Procter & Gamble, the Court held that the presence of one giant company with a dominant share of a highly concentrated market in which all the other companies were quite small tended to inhibit competition and create high barriers to entry. This conclusion was reached although Clorox's share of the liquid bleach market, 48.8 percent, was considerably smaller than United's present share of the shoe machinery market. Of course, *Procter & Gamble* was a merger case and this Court analyzed the competitive effect in the light of Section 7 of the Clayton Act which "was intended to arrest the anticompetitive effects of market power in their incipiency" (*Procter & Gamble Co., supra,* 386 U.S. at 577). In the instant monopolization case the object of the decree is to reduce market power to the point that its anticompetitive effects will be removed. Howover, *Procter & Gamble's* teaching—that a market structure like that presently existing in the shoe machinery in-

dustry is seriously anti-competitive—makes it clear that such a structure should not be allowed to persist after an adjudication of monopolization under Section 2. As this Court observed in the *Swift* case (286 U.S. at 116):

> Mere size, according to the holding of this court, is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly, * * * but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past. * * *

The barriers to new entry into the shoe machinery industry were great in 1953 and, as revealed by the district court's opinion, continued to be great in 1964. One of the objects of the 1953 decree was to remove these barriers so that either by new entry or growth of established competitors United's market share and market dominance would be lessened to the point that vigorous competition could flourish. However, the district court's opinion catalogues at great length the continuance of significant barriers (A. 81):

> There is a variety of causative factors [for United's dominance] such as United's financial capacity to offer lease terms commercially equivalent to sales terms on the same machinery types, United's broad line of machine products manufactured in one plant (which permits United with economic advantage to supply machine types for which there is a small annual market and which also permits United to set for different types of machines terms which reflects different rates of profitability),

> United's constant contacts with most shoe manufacturers as a result of the large volume of machines United ships annually and the large number of leases it has outstanding, and United's excellent products, superior skill in merchandising, efficiency in administration, inventions and know-how. Every one of those factors was known to this Court when it entered its decree in 1953. * * *

In point of fact, the enumerated factors were not merely known to the court in 1953, but were specifically referred to at that time as both deriving from and serving to perpetuate United's unlawful monopoly (see note 2, *supra*). Thus, little has changed since 1953, despite 10 years of operation of the decree. Most of the factors that had been found at that time to be the source of United's power to prevent entry of new competitors still are present to a significant degree.

Nevertheless, the district court viewed the persistence of these barriers to entry as consistent with the purposes of its decree. It stated: "In the sectors where it [competition] is not flourishing, all artificial barriers have disappeared and the position enjoyed by United is chiefly traceable to the fact that it has not yet been challenged by a competitor of financial resources of any magnitude" (A. 81). By "artificial barriers" we assume the court meant those exclusionary practices which were found unlawful and which the decree enjoined. Even if the court were correct in concluding that such barriers to entry have

been eliminated, that fact is hardly conclusive with regard to whether the decree has been effective in achieving its purpose of establishing workable competition. If that goal has not been attained, it matters little that the barriers to entry which continue to exist are termed something other than "artificial". Section 2 of the Sherman Act prohibits monopolization, not just particular kinds of monopoly power which are grounded on certain factors.

To state that United's continued dominance results from its not being successfully challenged is but to pose the problem, not to answer it; more than that, it is virtually to acknowledge the ineffectiveness of the decree. If "artificial" barriers to new entry no longer exist, "real" ones appear to be present. In such a situation, there must be at least some consideration of different and further ways to deal with the continuing problem. The district court also stressed that United's "dominance is not due to 'restraints of trade' in the technical sense" (A. 81). Again, however, the absence of additional antitrust violations by United since entry of the decree is irrelevant to the basic question of whether the decree had successfully established workable competition.[14]

In addition, the district court stated that in certain sectors of the shoe machinery market "United was

[14] While the instant record contains no evidence of such violations by United, the court refused to hear evidence tendered to establish new or continuing restraints of trade (Tr. 36–37), at one point taking the position that the issue should be raised in an independent case (Tr. 110–111).

without significant competition, but it does not follow that United's position in those sectors was a result of United's exclusionary power or made competition unworkable'' (A. 80). Rather, the court ruled that "the want of competition was due to the absence of a challenger of adequate, ~~but not~~ unusual, financial resources, skill, ability, and efficiency'' (*ibid.*), and that "[t]he apparent reason why no such competitor has appeared is that compared with rates of return in other machinery markets, the rate of return in the shoe machinery market is unattractive'' (*id.* at 82). However, there was no evidence before the court with respect to rates of return in other industries, for the court's pre-trial order excluded such data. And even if the rate of return in the shoe machinery industry were shown to be lower than in other industries, other substantial entry barriers did in fact result from United's illegal monopoly power and largely contributed to the absence of new entry (see *supra*, pp. 29–30). Thus, such an analysis does no more than provide a partial *explanation* of why effective competition has not been established—not a *justification* for the unsatisfactory operation of the decree. Of course this factor might bear on the feasibility of various possible forms of further relief. But it can hardly support a conclusion that no further relief is needed.

As to the specific barriers to new entry discussed earlier (*supra*, pp. 29-30), the district court ruled that "[n]ew information with respect to the operation of those factors since 1953 shows that they have not in-

dividually or collectively had an unforeseen effect or worked a grave wrong'' (A. 81). This conclusion—which reflects the district court's misapplication of *Swift* (see *infra,* pp. 34–41)—is beside the mark. Had the district court in fact foreseen that the decree would not effectively remove entry barriers, it presumably would have entered a decree which promised greater success. Moreover, such a statement constitutes an explicit concession that these factors, which were found to contribute to United's unlawful monopoly in 1953, were perpetuated under and despite the decree. That they continued to operate to bar entry means only that the decree entered in 1953 has turned out to be inadequate. That this might have been foreseen in 1953 and that these factors might conceivably have had more serious continuing effects on competition provides no affirmative support for the decree's effectiveness in ridding the market of United's monopoly power.

In sum, the original decree has not accomplished the essential purpose of relief in monopolization cases, dissipating the monopoly power and establishing effective competition in the affected industry, for: (1) United's monopoly power was not broken up or rendered impotent with the passage of 10 years, (2) imposing entry barriers presented by that monopoly power in 1953 remained in existence 10 years later despite the operation of the decree, and (3) there was no indication that the decree in its present form would remove these barriers and open up the market.

to significant competition.[15] Indeed, the district court stated that "[u]ntil there are competitors throughout the market the decree should stand unmodified" (A. 83)—yet it is the inadequacy of the decree itself that largely has been responsible for the absence of such competitors. A holding that the decree has proved inadequate is thus required. In failing so to hold, and in refusing to consider modification of the decree, the district court, we submit, was in error.

III. THE DISTRICT COURT APPLIED AN IMPROPER STANDARD IN CONCLUDING THAT NO MODIFICATION OF THE DECREE IS NECESSARY

A. THE STANDARD FOR THE MODIFICATION OF CONSENT DECREES ANNOUNCED IN *UNITED STATES* V. *SWIFT & CO.*, 286 U.S. 106, DOES NOT APPLY WHEN THE GOVERNMENT SEEKS MODIFICATION OF A LITIGATED ANTITRUST DECREE

In refusing to consider what changes in the 1953 decree would be appropriate, the district court relied on *United States* v. *Swift & Co.*, 286 U.S. 106, for the proposition that the government could obtain additional relief to dissipate United's monopoly only if it made "a clear showing of * * * grievous wrong * * * evoked by new and unforeseen conditions" (A. 74). In so doing, we submit, the court applied an

[15] In this regard, the district court's reason for rejecting United's petition for modification should be noted: "United wants to adjust the decree on the ground that the purposes of the decree have been accomplished and milder restraints are now in order. But the premise is unsound. The decree is still working at its long-range task of freeing the market from all consequences of United's monopolization and keeping the door wide open for the arrival of an adequately provided challenger" (A. 83).

erroneous standard for determining whether a decree in a monopolization case should be modified. In our view, the language quoted by the district court from *Swift* has no application where the government, as the prevailing party in a litigated case, invokes the lower court's continuing jurisdiction to order additional relief on the ground that the orginal decree has failed to establish effective competition after a reasonable time.[16] Not only is the *Swift* decision distinguishable factually from the instant case, but its rationale actually lends support to the government's contentions regarding the need for modification of the 1953 decree.

It is initially important to note what *Swift* did, and what it did not, involve. The defendant meat packers in that monopolization case had consented to a decree enjoining them from selling meat at retail and from wholesaling or retailing in non-meat commodities. They had almost continually (though unsuccessfully) sought to have that decree vacated or attenuated by the courts (see 286 U.S. at 112–113). In rejecting the last such attempt, in which they sought to have the injunction modified to permit their wholesaling in grocery items, this Court stressed the remedial aspects of Section 2, noting (*id.* at 116):

> [S]ize carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past. The original decree at all events was framed upon

[16] Here the time period was expressly set by paragraph 18 of the decree which provided for evaluation of its effectiveness after the passage of 10 years (see *supra*, p. 6).

> that theory. It was framed upon the theory that even after the combination among the packers had been broken up and the monopoly dissolved, the individual units would be so huge that the capacity to engage in other forms of business as adjuncts to the sale of meats should be taken from them altogether * * *. It said that the privilege should be renounced forever * * *.
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> The question is not whether a modification as to groceries can be made without prejudice to the interests of producers of cattle on the hoof. The question is whether it can be made without prejudice to the interests of the classes whom this particular restraint was intended to protect. * * * [*Id.* at 117–118.]

Thus, the *Swift* decree was designed to protect the interests of a number of groups adversely affected by the defendants' monopoly power, and, ultimately, to promote the public interest in viable competition—the function of all antitrust decrees secured by the government. The defendants had requested, over the government's opposition, that certain provisions to which they had consented and which were designed to protect the public interest, be revoked. In those circumstances, the Court refused to modify the decree absent a clear showing that the defendants were suffering a hardship of sufficient magnitude to outweigh the considerations of policy which supported a continuance of the decree's strictures.

Here, we have an exactly opposite situation—it is the government, as the prevailing party seeking to vindicate the public interest, which asks for modifica-

tion of the decree. All of the arguments against modifying the decree in *Swift* on the defendants' petition here militate in favor of the government's request for modification—*i.e.*, protection of the public interest is of paramount importance in determining whether additional relief should be considered.

Indeed, this Court's greatest concern in *Swift* was that a provision in an antitrust decree designed to protect the public interest should not be modified or expunged except in the most extraordinary circumstances. To apply this rationale as a ground for refusing to consider modification at the instance of the government, where the government's view is that the existing decree is not adequately protecting the public interest, stands *Swift* on its head. As the Court stated in *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515, 552, "[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

Thus, a significantly lesser showing than *Swift* requires is sufficient to obtain modification in the instant case. Here the government, which had prevailed on the merits, sought modification—not a private party subject to the decree, as in *Swift*. Here a decree obtained through litigation was involved, not a consent decree to which the defendants in *Swift* had agreed. Here the decree expressly contemplated a reconsideration of its effectiveness after a specific period of time; there was no such provision in *Swift*. In short, the *Swift* standard was enunciated in radically different circum-

stances, and has application where, but only where, a similar situation is presented.

In addition, the *Swift* opinion recognizes that changed circumstances may require modification of a decree which has proved ineffective.[17] As noted earlier (*supra*, p. 25), *Swift* pointed out that the lower courts have the duty of continuing "supervision of changing conduct or conditions" affecting decrees that are "provisional and tentative" in nature (286 U.S. at 114). See also *United States Gypsum Co.* v. *National Gypsum Co.*, 352 U.S. 457, 464; *Hughes* v. *United States*, 342 U.S. 353, 357. Accordingly, and consistent with *Swift*, the proper test to be applied when the government requests modification of a litigated decree is not whether some unforeseeable turn of events has clearly rendered the original decree wholly inadequate. Rather, it is simply whether modification would serve to effectuate the basic but yet unrealized aim of the original decree, namely, to establish effective competition. By the very nature of the subject, decrees in Section 2 cases are not infrequently tentative and provisional. It is at all events clear that the decree in the instant case fits into that category, for by its terms it contemplated reexamination after a prescribed period of time (see *infra*, pp. 41–45). It is equally clear that the district court expressly recognized this when it entered the decree (see *supra*, pp. 5–6).

An example of the proper approach to take in a

[17] Indeed, this Court recently cited *Swift* in *Los Angeles Meat & Provision Drivers Union* v. *United States*, 371 U.S. 94, 103, for the proposition that "[i]f that situation should change in the future, the District Court will have ample power to amend its decree." See also *Associated Press* v. *United States*, 326 U.S. 1, 22–23.

case such as the instant one is provided by *Chrysler Corp.* v. *United States,* 316 U.S. 556, 563. That case involved consent judgments in parallel antitrust actions against Chrysler and Ford which provided that certain provisions would terminate unless similar relief was obtained by a stated date in a similar suit against General Motors. At the stipulated time the General Motors action was still pending and no relief had been obtained. In *Chrysler* this Court held that the district court had not abused its discretion by extending the time limit in the Chrysler judgment, stating: "We think that the test to be applied in answering this question is whether the change served to effectuate or to thwart the basic purpose of the original consent decree. *United States* v. *Swift & Co.,* 286 U.S. 106" (316 U.S. at 562).[18] Indeed, the instant case presents an even stronger basis for granting the government additional relief than *Chrysler* because (1) it involves a litigated rather than a consent decree;[19] (2) it involves the failure of the present decree effectively to cure the violation; (3) the govern-

[18] After another six years had passed with the General Motors proceeding still pending, an additional extension of the date in the Ford judgment granted by the district court was set aside by this Court because the government had not "sustained the burden of showing good cause why a court of equity should grant relief from an undertaking well understood and carefully formulated." *Ford Motor Co.* v. *United States,* 335 U.S. 303, 322. Ford would have been kept at a competitive disadvantage to General Motors, the industry giant, if the restrictions of the decree were permitted to continue (*id.* at 321). See Note, *Flexibility and Finality in Antitrust Consent Decrees,* 80 Harv. L. Rev. 1303, 1311–1314 (1967).

[19] Because both parties have agreed upon the terms of a consent decree, such as in *Swift* or *Chrysler*, it should not readily be modified at the instance of only one party.

ment is in no way responsible for the factual circumstances upon which the claim for additional relief is grounded;[20] and (4) the district court specifically provided in its decree for an evaluation of its effectiveness in the manner and at the time resorted to by the government.

If the stringent *Swift* test for modification is applied to the government, the effect would be to leave unchanged, unless there were an extraordinary change of circumstances, a decree which, within a reasonable time, had not satisfactorily rectified the antitrust violation and eliminated its anti-competitive effects. Such a rule would improperly and unnecessarily curtail judicial authority to deal adequately with the most crucial aspect of antitrust litigation—securing adequate relief. To be sure, modification to further the purposes of the decree may impose additional burdens upon the defendant. But those burdens are the consequence of the antitrust violation the defendant has committed. They could have been imposed in the original decree, and the defendant cannot properly complain if they are subsequently imposed when that decree proves inadequate. See *du Pont, supra,* 366 U.S. at 326.

Of course, it is desirable to avoid, if possible, continuing judicial supervision of business activity conducted under an antitrust decree. Cf. *United States* v. *Paramount Pictures,* 334 U.S. 131, 162–164. But that

[20] In *Chrysler* the government was of course a party to, and thus had some control over the progress of the General Motors case (see *Ford Motor Co.* v. *United States*, 335 U.S. at 321); no parallel circumstance is involved here.

policy must bow to the need for insuring effective relief in the particular case. See *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651. Neither *Swift* nor any other precedent requires the restrictive approach to modification of antitrust decrees adopted by the district court in the circumstances of this case. To the contrary, *Swift* teaches only that such modification should be sparingly granted where that approach is necessary for effective enforcement of the antitrust laws and adequate protection of the public interest. To turn *Swift* around and apply its standard in the instant case is to ignore the reasons of sound policy which supported a restrictive approach to modification there but militate in the opposite direction here.

B. THE DISTRICT COURT ERRONEOUSLY INTERPRETED THE PROVISION IN PARAGRAPH 18 FOR REEXAMINATION OF THE DECREE'S EFFECTIVENESS AFTER 10 YEARS

After determining that *Swift* severely limited its power to modify the decree, the district court ruled that paragraph 18 of the decree gave it no broader power. Although paragraph 18 explicitly provided for reexamination after ten years of the decree's "effect in establishing workable competition" (A. 7), the district court stated that its use of the phrase "workable competition" in 1953 "was unfortunate because it has no precise meaning" (A. 74). According to the court, "if paragraph 18 be read against the accompanying opinion * * *, it is apparent that what the Court was inviting was information as to how successful the decree had been in gradually eroding United's 1953 power to monopolize the

market" (*ibid.*). In other words, the court said, its opinion made it "plain that the object of the decree was during a ten year period not to restore so-called workable competition but to move toward establishing it" (*ibid.*). If this is all that the court intended the decree to accomplish, then it was seriously inadequate to redress the violation found in 1953, and there is now more, rather than less, need for modification.

Moreover, we believe that the district court's interpretation of the decree, and specifically of paragraph 18 thereof, is erroneous. In the first place, that reading substitutes for the plain meaning of the language of the 1953 opinion and decree—which the government relied upon in determining not to appeal and which this Court presumably relied upon as well in affirming—a contradictory and previously unarticulated standard for relief in monopolization cases. More importantly, the present view of the court below is inconsistent with the accepted standards governing the scope of antitrust relief, and would have been equally so in 1953. In addition, such a reading wrenches paragraph 18 almost wholly out of the context in which it was written, and renders it essentially meaningless.

As noted previously (*supra*, p. 5), the 1953 opinion and decree recognized that in order to rid a market of the effects of monopolization it is necessary to dissipate monopoly power and establish effective competition. Read in the light of these objectives, the plain purpose of paragraph 18 was to set a reasonable time period in which to permit the decree to cure the violation; if it did not do so during that period, that provision plainly contemplated modification of the decree to provide further, effective relief.

The fact that the district court did not phrase paragraph 18 in exactly these terms but instead used the term "workable competition" did not change the stated and clearly understood purpose of that provision. It is of course true that the phrase "workable competition" cannot be given a precise definition that would be universally accepted. However it might be defined, one thing seems quite clear: the term is not synonomous with "workable monopoly" and the gradual erosion of monopoly power does not, in anyone's language, mean that "workable competition" has been effectively established in the industry. In our view, the phrase "workable competition" in paragraph 18 must be read as meaning nothing more—and, more significantly, nothing less—than the achieving under the decree of the commonly understood policy objectives of Section 2.[21] It called for a deter-

[21] A similar inquiry was undertaken by the district court in the *Alcoa* case where the result sought to be attained was phrased slightly differently—*i.e.*, "effective competition." *United States* v. *Aluminum Company of America*, 91 F. Supp. 333 (S.D.N.Y.). In *Alcoa* the court examined market shares, industry trends, competitive dynamics and entry problems in ascertaining whether or not unlawful monopoly power had been terminated and substantial or effective competition had been created.

See also *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 176, quoting from Report of the Attorney General's National Committee to Study the Antitrust Laws, 320 (1955):

> The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sellers, whether existing competitors or new or potential entrants into the field, would keep this power in check by offering or threatening to offer effective inducements * * *.

mination whether, after 10 years, the decree had accomplished its purposes—not whether it was gradually moving toward its objectives.

Provisions for reexamination constitute an important element of antitrust relief, for they serve to delineate the timing and manner of checking the court's predictions, as reflected in the original decree, against observed economic developments. Such provisions, if selectively used in particular cases where relief questions are complicated and difficult, permit a desirable degree of flexibility on the part of antitrust enforcement officials as to the nature and scope of relief sought initially. This is especially so in monopolization cases, where relief questions are seldom easy. Such provisions measurably assist lower courts in designing effective, but not unduly or unnecessarily harsh, remedies, and tend to reduce the necessity for appeals by the government concerning the adequacy of relief. But to accomplish their purpose such provisions must be interpreted according to their plain intendment.

In short, paragraph 18 cannot simply be written off as adding nothing to the district court's general authority to modify the decree. It means what it says, and should be taken at face value. As we have demonstrated (*supra*, pp. 34–41), the *Swift* standard is inapplicable where the government seeks modification of a litigated antitrust decree. This is particularly so where the decree, in addition to containing a general retention of jurisdiction to modify, includes a specific provision such as paragraph 18. To reject the empirical evidence which paragraph 18 plainly contem-

plated would be the basis for determining the need for modification makes reconsideration in the light of experience meaningless and in effect reads that provision out of the decree.

Finally, the district court apparently gave undue weight to its denial of divestiture in 1953. In concluding its opinion, the court stated (A. 82):

> It may have been an error in 1953 not to have dissolved United rather than to allow sectors of its power to be dissipated by small competitors, and to leave other sectors of power to be effectively attacked only when a small competitor became large or a large competitor appeared. But the choice was made in 1953 for reasons already adequately explained.
>
> What the Government is complaining of is not that the decree did not work as expected, but that working in the foreseeable and intended way the decree did not accomplish what the Government had originally prayed for and which this Court had rejected. In short, the Government petitions that the decree be reversed because this Court erred in 1953. On the authority of the *United States* v. *Swift & Co.*, 286 U.S. 106, 119, the Government's petition is denied.[22]

[22] In this regard, it should be noted that the district court stated on one occasion (Tr. 40–41): "I have tried repeatedly in pretrial sessions to explain what I regarded as the narrow scope of what was open to you under Paragraph 18 of the decree. It is not my intention to allow this case to develop into a retrial of what was tried a decade and a half ago.

"Paragraph 18 of the decree was not proposed by either party; it was my own insertion in the decree. All that I ever

But the question presently is not whether "[i]t may have been an error in 1953 not to have dissolved United," but whether in light of the decree's lack of success in dissipating United's monopoly power, that determination requires reexamination 10 years later. A similar approach was also reflected in the district court's pre-trial order.[23] Thus, it seems clear that the district court viewed the government's modification petition as little more than an untimely attempt to attack the 1953 decree.

In our view, the district court's suggestion that the government is attacking the result reached in 1953 misses the crucial point in this case. When the decree—which was reasonably supported by the facts available when it was entered—is viewed in the light

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contemplated was the most general review. If anybody thinks I am prepared to have a full-scale trial here, he is much mistaken. All that I intend to do is take a quick look to see whether there was a manifest error committed by this Court in 1953."

[23] In the pre-trial order the court stated (App., *infra*, p. 55):

"Nor has the Court presently any different view from the one earlier expressed as to the desirability, or lack of desirability, of radical schemes of divestiture of United so as to atomize the enterprise. It is, therefore, inappropriate as of this time to offer any suggested program of divestiture, which if considered later in the hearings certainly will require a conclusive showing of the failure of the decree, as now operative, to have effected the goals originally contemplated."

of 10 years' working experience, we are in a position to answer the critical question whether it has operated as it should have to accomplish its intended objectives. Yet, the question asked and answered by the district court, in essence, was whether the relief appeared adequate at the time the decree was entered.

IV. THE CASE SHOULD BE REMANDED WITH DIRECTIONS THAT THE DISTRICT COURT GRANT SUCH FURTHER RELIEF AS IS NECESSARY TO ESTABLISH EFFECTIVE COMPETITION IN THE SHOE MACHINERY INDUSTRY.

As the foregoing discussion makes clear, the failure of the injunctive provisions of the original decree to establish effective competition in the shoe machinery industry after a full decade indicates that more effective measures are now necessary. Since mere changes in United's restrictive practices, under the original decree, have not done the job, the district court should now consider more direct measures which will deprive United of the benefits of its past illegal conduct and break up its monopoly position. But because of the way in which the court chose to proceed (see *supra*, pp. 12–14) and its finding that no modification of the decree was necessary, no evidence relating to the question of additional relief has been introduced. It is therefore necessary, before the decree can be modified, to hold a hearing, preceded by discovery, to receive

and assess such evidence. See *Hughes, supra.* There is, however, no reason for the district court to reconsider any other aspects of this case. A remand should accordingly be limited solely to the question of what modifications of the decree would be necessary and appropriate to accelerate the elimination of United's dominance and to establish effective competition in the industry.

Since there has been no hearing on additional relief and since the relief question may be complicated by factors such as United's single-plant operation, it seems appropriate at this time only to "tentatively suggest rather than to specifically demand definite and precise remedies" (*United States* v. *American Tobacco Co.,* 221 U.S. 106, 186). It is our view that the guiding principle in disposing of this case must now be that, when injunctive provisions have been given a fair opportunity to dissipate unlawful monopoly power and the monopolist nonetheless retains market dominance, there should be a presumption in favor of remedies designed to change the structure of the industry—*i.e.,* some form of divestiture. Indeed, in view of the history of this case and the present state of the industry, we believe that, at least *prima facie,* a need for divestiture of a portion of United's shoe machinery assets has been demonstrated.

We of course do not suggest that structural remedies ought not to be utilized initially in Section 2 cases. Cf. *Grinnell, supra.* Rather, our point is only that if such remedies are not so employed, the demonstrated failure of less stringent relief makes them presumptively appropriate at a later date. Thus, al-

though the district court in denying divestiture in 1953 relied on the fact that United produced all of its shoe machinery in one factory, this factor cannot be permitted to foreclose for all time any consideration of structural relief. For example, United's roof may in fact cover a multitude of quite separable operations and the adverse impact of partial divestiture may not be great; or without disturbing existent plant facilities, United may be required to establish a new competitive entity.

Since market power is often closely related to dominance in productive capacity, one of the most effective means of diluting that power is to convert part of the capacity into a new source of competition. See *Alcoa, supra.* Relief designed to change the structure of the market, including divestiture, should now be withheld only if it is established that such relief would frustrate the goals of the litigation by causing a net impairment in the long-run performance of the shoe machinery industry as a whole or by working an undue hardship upon the American shoe manufacturing industry, which would be an important beneficiary of the effective functioning of the shoe machinery market. Hardship to United itself should be no bar to effective relief (see *supra,* p. 40). Whether there are facts that would overcome the presumption in favor of partial divestiture or other structural relief cannot be known until a full record has been developed in the district court.

At least two possible methods of divestiture immediately suggest themselves: (1) requiring United

to sell part of its shoe machinery manufacturing assets to another company, or (2) requiring United to create an independent company to manufacture shoe machinery.[24] The problems and virtues in each can only be assessed after the full evidentiary hearing we propose. We of course recognize that the district court in 1953 rejected a suggestion that United be dissolved into three manufacturing concerns because it considered that proposal to be impractical (110 F. Supp. at 348–349). But practicality is relative to what lesser measures can achieve and have in fact accomplished. Since provisions short of divestiture have proved unsuccessful, it is appropriate—indeed, in our view, essential—to reconsider some form of structural relief.

Other kinds of relief might be utilized if those suggested above should not prove practicable. As we indicated in our Jurisdictional Statement (pp. 22–

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[24] In the government's petition for modification (*supra*, p. 7) it was suggested, as to additional relief, that United be required "to submit to the Court a plan, pursuant to which the defendant shall establish an independent full-line shoe machinery manufacturing company capable of competing with the defendant in the shoe machinery market," and requested "such other and further relief as may be necessary to establish workable competition in the shoe machinery market." We do not view the suggestion that United be required to establish a competing company as the only suitable form of further relief. Nor was that our intention when the petition for modification was filed, notwithstanding the district court's apparent view to the contrary (see *supra*, pp. 13–14). Rather, that suggestion was one made at the initiation of the instant proceeding and simply represents one form of the basic additional relief which the government views as, at least *prima facie*, necessary and deserving of thorough exploration.

23), a new competitor might be created from one of United's present divisions, with the requirement that United transfer to that company sufficient productive assets, patents, technological know-how and personnel to enable it to begin successful operations. Or United's British subsidiary, if separated from its parent, might become an important actual or potential competitor in the American domestic market. Its entry might be expected to motivate existing companies in the market, including United, to more efficient performance, particularly in regard to the development of new machines. Other possibilities for some form of structural relief may be developed during the district court's exploration of the question. If there are substantial economic or practical reasons why such relief is not feasible, considering the present state of the industry or United's existing organization, the burden should be upon United—not the government—to establish this at the hearing. At all events, until an evidentiary hearing is held on the question of additional relief, the prospects for more effective remedial action cannot be adequately evaluated.

Finally, we note that the passage of time has rendered the decree much weaker than when it was entered. While it requires mandatory licensing of all patents held by United in 1953, most of those patents must have expired in the intervening 15 years. Therefore, United may now be able to utilize new patents, as in the past, to exclude competition and to solidify its control of the market. Thus, modification of the decree may also require the updating of certain provisions,

such as those governing patent licensing,[25] so as to minimize barriers to entry and stimulate competition from existing companies.

CONCLUSION

For the reasons stated, the order of the district court should be set aside and the case remanded for the formulation of additional relief which will expeditiously establish effective competition in the shoe machinery market.

Respectfully submitted.

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JANUARY 1968.

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[25] This could be accomplished by requiring United to make available to other companies in the industry, on a reasonable royalty basis, all of its present and perhaps later-acquired patents for a reasonable period of time.

APPENDIX

PRE-TRIAL ORDER NO. 1

July 19, 1965

WYZANSKI, J.

A hearing having been held on June 25, 1965 with respect to various proposed pre-trial orders, and opportunity having been given to the parties and to amici curiae to file written statements, it is now ORDERED that

A. Issues to be considered at the hearings in this case will be confined to testimony, stipulated in so far as practical, with respect to the following 11 matters:

1. With respect to each type of machine manufactured by United, the number of machines in the Continental United States known to have been outstanding as of some date shortly after the effective date of the decree, say, for example, January 1, 1955, such machines to be shown as either (1) sold and supposed to be in use, or (2) leased.

2. The same sort of facts as of approximately the same date with respect to machines not of United manufacture, whether domestic or foreign. (If necessary general estimates will suffice.)

3. The same sort of facts with respect to United machines as of approximately January 1, 1965. (If inventories were taken at some date other than the first of the year, this will be satisfactory.)

4. The same sort of facts with respect to non-United machines as of a date close to that used in the previous paragraph.

5. Any general trends explaining the changes shown between 1 and 3, and between 2 and 4. Such trends to be described in a broad way, not necessarily on an annual basis.

6. A general comparison of the second-hand machinery market as of approximately January 1, 1955 and as of approximately January 1, 1965.

7. A general description of changes during the last decade in demands and requirements of the domestic shoe manufacturing industry for machines for shoe production; and changes in the number and types of United and of non-United equipment available.

8. Shipments to Continental United States shoe factories during 1964 for (a) sale and (b) lease by (a) United and so far as available, (b) United's domestic competitors and (c) United's foreign competitors. Such shipments, so far as possible, should be broken down according to type of machine.

9. A general statement of the net worth, as of approximately January 1, 1965, the annual net income in 1963 or 1964, the number of employees as of approximately January 1, 1965, and types of machines offered as of approximately January 1, 1965 of (a) United and, so far as available, (b) United's domestic competitors and (c) United's foreign competitors.

10. A general description of the effect of the decree provisions relative to the rendering of installation, instruction, repair and other services.

11. A general, and not in any sense a detailed, description of any significant developments during the last decade in the issuance of shoe machinery patents, or licensing of such patents, or challenges to their validity, or ef-

forts in or out of court with respect to their enforcement against asserted infringers.

B. No matter outside of those eleven matters will be considered by the Court except after a specific preliminary finding that such an excursion is necessary to achieve justice.

C. This case will be heard solely with respect to progress made under this Order, September 17, 1965, unless postponement for good cause is necessary. Proceedings at a later date will follow the usual course of affording the right to proceed first to the Government, second, to the amici curiae in so far as the Court deems presentation by them in the interest of justice, and third, to United. Whether rebuttal will be proper cannot now be determined.

D. It is the Court's present view that the testimony should be largely based on stipulated facts, and that there should be no occasion for an extensive program of hearings, inasmuch as the Court, considering the growth, or lack of growth, of legal principles during the last decade, chiefly desires an updating of factual information previously available. Nor has the Court presently any different view from the one earlier expressed as to the desirability, or lack of desirability, of radical schemes of divestiture of United so as to atomize the enterprise. It is, therefore, inappropriate as of this time to offer any suggested program of divestiture, which if considered later in the hearings certainly will require a conclusive showing of the failure of the decree, as now operative, to have effected the goals originally contemplated.

CHARLES E. WYZANSKI, Jr.,
United States District Judge.

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